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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1952.

No. 456

WILLIAM P. MCNISH, *Petitioner, Appellant,*

vs.

THE AMERICAN BRASS COMPANY and the ANSONIA BRASS WORKERS' UNION LOCAL No. 445 P.M.C. of the INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, C.I.O., *Respondents, Appellees.*

BRIEF OF THE RESPONDENT, THE AMERICAN BRASS COMPANY, IN OPPOSITION TO PETITIONER'S BRIEF ON HIS PETITION FOR A WRIT OF CERTIORARI

THE AMERICAN BRASS COMPANY, Respondent,
By: WILLIAM J. LARKIN, JR.,
Its Attorney.

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TABLE OF CONTENTS

PAGE

I. Legal Issues Presented 1

II. The Ultimate Question: "Is the special defense of the respondent, which alleges exclusive jurisdiction of the National Labor Relations Board over matters alleged in the petitioner's complaint, sufficient against the claims set forth in petitioner's Second Count, which alleges conspiracy between the respondents, and discrimination against the petitioner's rights under the Collective Bargaining Agreement between the respondents, and his "rights of seniority as provided by the Taft-Hartley Act", (R. p. 7, paragraphs 24, 25, and 26)?" 3

III. Answers in Opposition to Petitioner's Request for a Writ of Certiorari:

1. The Labor-Management Relations Act, the applicable federal decisions and the charges of the petitioner himself leave no doubt that the matters alleged in the petitioner's complaint are charges of unfair labor practices.

2. The Labor-Management Relations Act and the applicable federal decisions have already uniformly stated that exclusive jurisdiction over charges of unfair labor practices is in the NLRB 4

IV. Conclusion 9

AUTHORITIES CITED.

Cases.

PAGE

Alonzo vs. Industrial Container Corp. (N.Y.), 193 Misc. 1008, 85 N.Y.S. (2d) 835 8

Amazon Cotton Mills Co. vs. Textile Workers' Union, (1948), 167 F. 2d. 183 8

Barnet Corp., 92 N.L.R.B. 589 5

Born vs. Cease, (1951) 101 F. Supp. 473 ..... 6, 8

California Association of Employers vs. Building Construction Trades Council, 9 Cir. (1949), 178 F. 2d. 175, 177 8

Cashman vs. Meriden Hospital, 117 Conn. 585, 588, 169 A. 915 2

Cen-Tennial Cotton Gin Co., 90 N.L.R.B. 345 5

Gerry vs. Superior Court (Cal.) 19 P 2d 689 6

Kansas-Nebraska Natural Gas Co., 90 National Labor Relations Board, 1923 5

NLRB vs. Link-Belt Co., (1940) 311 U.S. 584, 61 S. Ct. 358, 85 L. ed 368 5

NLRB vs. Minnesota Mining & Manufacturing Co., 179 F 2d 323 5

NLRB vs. Piedmont Cotton Mills, 179 F 2d 345 5

Norris Grain Co. vs. Nordass (Minn.) 46 NW 2d 94 9

Pocahontas Terminal Corp. vs. Portland Building and Construction Trade Council, 93 F. Supp. 217 8

Ryan vs. Simons, 302 N.Y. 742, 847, 98 NE 2d 707, 100 NE 2d 44, certiorari denied 342 U.S. 897, 72 S. Ct. 231, 96 L. ed 140 ..... 6, 8

Schatte vs. International Alliance, 182 F 2d 175, 177 8

Statutes.

Labor-Management Relations Act of 1947 (Taft-Hartley Act), 61 U.S. Stat. 136, 29 USCA 141-161 ..... 4, 6, 7

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BRIEF OF THE RESPONDENT, THE AMERICAN BRASS COMPANY, IN OPPOSITION TO PETITIONER'S BRIEF ON HIS PETITION FOR A WRIT OF CERTIORARI

LEGAL ISSUES PRESENTED

The petitioner brought suit against the respondent, The American Brass Company, and the respondent, Union of Marine and Shipbuilding Workers of America, alleging that the respondent, The American Brass Company, breached the Collective Bargaining Agreement between it and the Union in that it had laid off the petitioner out of line of seniority, had failed to transfer him or to re-employ him, and had conspired with the Union to

deprive him of his grievance rights; and that such actions were an unjust discrimination against the petitioner and against his rights of seniority under the "Taft-Hartley Act" and in violation of that Act, and the Collective Bargaining Agreement and seeking damages and equitable relief.

The respondent, The American Brass Company, filed three special defenses to all counts of petitioner's complaint. The second of these special defenses, upon which the Supreme Court of Errors of the State of Connecticut based its decision and which is decisive of the entire issue (as admitted by the petitioner, Petition p. 19) alleged that the matters contained in the petitioner's complaint were within the exclusive jurisdiction of the National Labor Relations Board, as set forth in the Labor-Management Relations Act of 1947.

To this special defense the petitioner filed a general demurrer (R. p. 27) which, in effect, claimed that the special defense of the respondent was not a sufficient defense against either count of the petitioner's complaint (R. p. 50).

By applying the state law of pleading, the Supreme Court of Errors decided that, since the special defense was good as against the petitioner's Second Count, the Demurrer, being general, failed, and that the lower court was correct in overruling the petitioner's demurrer, citing Cashman vs. Meriden Hospital, 117 Conn. 585, 588, 169 A. 915, and cases cited therein.

The ultimate question that will be presented for review should the petition for certiorari be granted by this court, therefore, is:

Is the special defense of the respondent, which alleges exclusive jurisdiction of the National Labor Relations Board over the matters alleged in the petitioner's complaint, sufficient against the claims set forth in petitioner's Second Count, which alleges conspiracy between the respondents, and discrimination against the petitioner's rights under the Collective Bargaining Agreement between the respondents, and his "rights of seniority as provided by the Taft-Hartley Act."....(R. p. 7, paragraphs 24, 25 and 26)?

Throughout his brief, the petitioner has set forth the claim that he is entitled to sue in a state court for damages for breach of the Collective Bargaining Agreement between the union and his employer, and that therefore the National Labor Relations Board does not have exclusive jurisdiction of the matters alleged in his complaint.

It is submitted that this issue raised by the petitioner is neither a federal question nor one of substance at this stage. The question of whether the National Labor Relations Board does have exclusive jurisdiction must first be decided before the necessity for determination of an employee's rights to sue upon a Collective Bargaining Agreement arises. And that question will be one governed by the state law of contracts.

Therefore, the answers in opposition to petitioner's request for a writ of certiorari are these:

1. The Labor-Management Relations Act, the applicable federal decisions and the charges of the petitioner himself leave no doubt that the matters alleged in the petitioner's complaint are charges of unfair labor practices.

2. The Labor-Management Relations Act and the applicable federal decisions have already uniformly stated that exclusive jurisdiction over charges of unfair labor practices is in the National Labor Relations Board.

1. The petitioner, in the Second Count of his complaint, which is directed at both the respondents, has alleged specifically that "The actions of the Defendants aforesaid, were also an unjust discrimination against the Plaintiff and against his rights of seniority, as provided by the Taft-Hartley Act, and in violation thereof" (R. p. 7, paragraph 26).

By his own terminology, the petitioner has characterized his charge as one of an unfair labor practice, for, speaking broadly, there are no rights of action arising to the petitioner under the Act the violations of which are other than unfair labor practices. The petitioner has pin-pointed the violations of which he complains—deprivation of his rights of seniority and disallowance of his grievance. Such violations are declared by the Labor-Management Relations Act to be unfair labor practices (Sections 8 (a) (3, 5) and 8 (b) (2).

The allegations of the petitioner's complaint (R. p. 2, 7) may well be compared with the almost identical unfair labor practice charge filed with the National Labor Relations Board by the petitioner (R. p. 18). In his charge the identical practices of the two respondents are labeled as unfair labor practices. Indeed it may be noted that the petitioner's charge was turned down by the National Labor Relations Board, not on the grounds that the charge was **not** one of an unfair labor practice but that there was no substance to the charge (R. p. 20).

Numerous decisions of this Court, the lower federal courts and the National Labor Relations Board itself have already held that a charge such as that of the petitioner is one of an unfair labor practice. Among the decisions so holding are:

National Labor Relations Board vs. Link-Belt Co., (1940) 311 U.S. 584, 61 S. Ct. 358, 85 L. ed 368;

National Labor Relations Board vs. Minnesota Mining & Manufacturing Co., 179 F. 2d 323;

National Labor Relations Board vs. Piedmont Cotton Mills, 179 F. 2d 345;

Cen-Tennial Cotton Gin Co., 90 National Labor Relations Board, 345;

Kansas-Nebraska Natural Gas Co., 90 National Labor Relations Board, 1423;

John S. Barnes Corp., 92 National Labor Relations Board, 589.

The petitioner has attempted in his brief to differentiate his charges from those of charges of unfair labor practices. A reading of the complaint will reveal that his request is basically one for damages and reinstatement under the seniority provisions of the Collective Bargaining Agreement. It is submitted, therefore, that this complaint is essentially one alleging unfair labor practices and that the petitioner's attempted differentiation is unavailing.

Thomas Ryan et al vs. Joseph Simons et al, 302 NY 742 847, 98 NE 2nd 707, 100 NE 2d 44, certiorari denied 96 L ed 140.

Born vs. Cease, 101 F Supp. 473.

Gerry vs. Superior Court (Cal.) 194 P 2d 689

2. The relevant portion of Section 10 (a) of the Labor-Management Relations Act reads as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

Those portions of Section 8 relevant to the charges made by petitioner in his complaint are as follows:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a) [which section gives employees the right to present their grievances.]

"Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ."

As pointed out above, the charges of the petitioner, by their wording themselves and by the nature of the charges, fall uniformly within the quoted portions of Section 8, which sections the Act itself, in section 10 (a), has stated to be within the exclusive province of the National Labor Relations Board.

The reasoning of **Amazon Cotton Mills Co. vs. Textile Workers' Union**, 167 F. 2d 183, has been uniformly followed in holding that the exclusive jurisdiction of charges of unfair labor practices under the Act is in the National Labor Relations Board. In that case it was held that the Federal District Court did not have jurisdiction over an unfair labor practice charge, the Court stating (Parker, C. J.) with relation to the Labor-Management Relations Act that "There is no indication of any intention to change the method by which unfair labor practices were dealt with under the Act or to vest the district courts with jurisdiction as to these matters, except to the limited extent that such jurisdiction was expressly conferred" (P. 186).

Further cases supporting this position are:

Thomas Ryan et al vs. Joseph Simons et al, 302 NY 742, 847, 98 NE 2d 707, 100 NE 2d 44, certiorari denied 342 U.S. 897, 72 S. Ct. 231, 96 L. ed 140.

California Association of Employers vs. Building Construction Trades Council, 9 Cir. 1949), 178 F 2d 175, 177.

Schatte vs. International Alliance, 182 F 2d 158, 166.

Born vs. Cease, Supra

Pocahontas Terminal Corp. vs. Portland Bldg. & Construction Trade Council, 93 F. Supp. 217

Alonzo vs. Industrial Container Corp. (N.Y) 198 Miss. 1008, 85 N.Y.S. (20) 835

Norris Grain Co. vs. Nordaas (Minn.) 46 N.W. (20) 94

CONCLUSION

It is submitted, therefore, that because petitioner's charges are clearly those of unfair labor practices and because it has been uniformly held that exclusive jurisdiction over such charges is in the National Labor Relations Board, the petitioner's request for a writ of certiorari should be denied.

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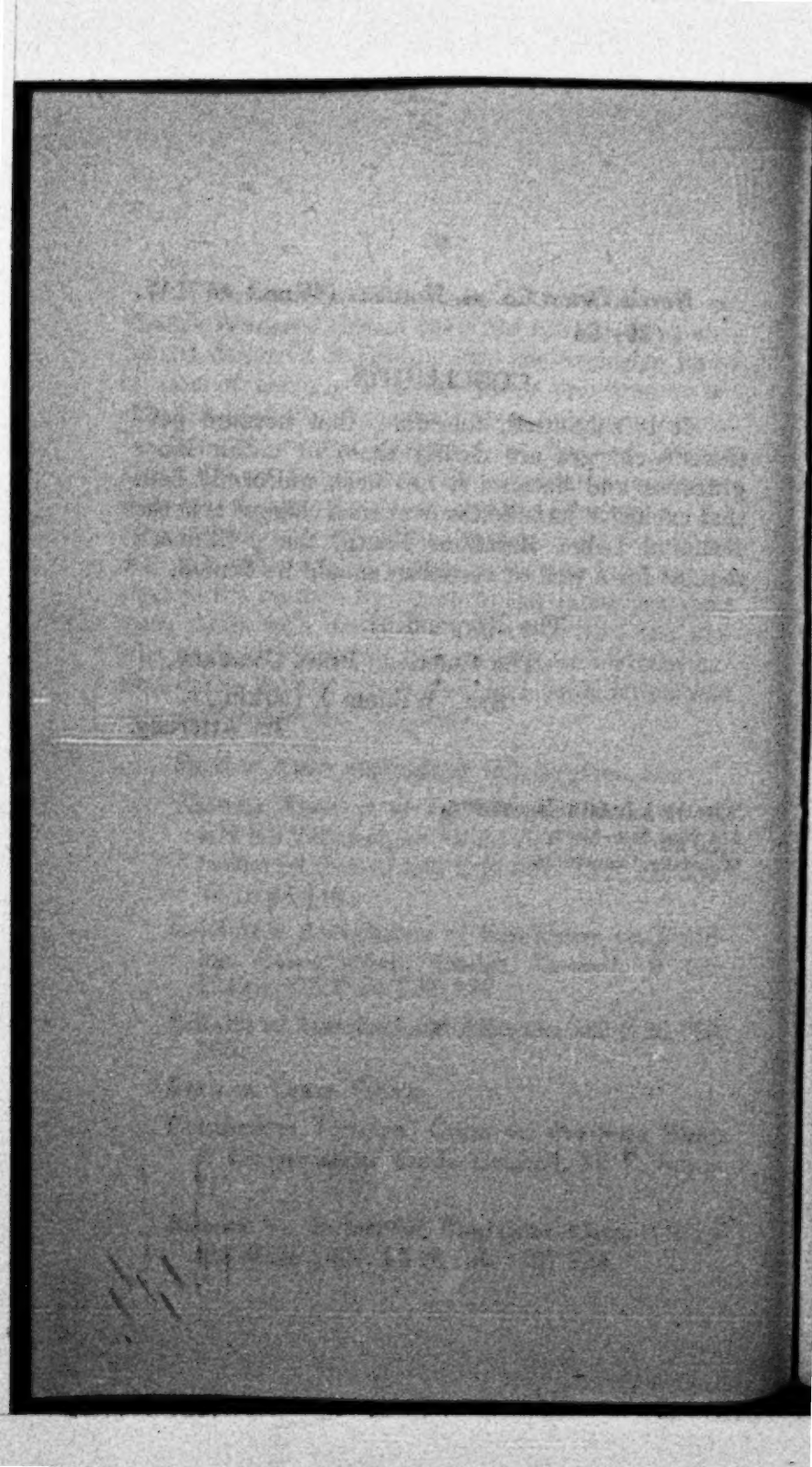

3

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

ANSONIA BRASS WORKERS UNION
LOCAL 445, P.M.C., IUMSWA,
C.I.O., Respondent, Appellee,

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TABLE OF CONTENTS

PAGE

I. Opinions Below 1

II. Jurisdiction of the Court 2

III. Legal Issue Presented for Review 2

IV. Federal Statutes Involved 4

V. Nature of the Case 7

VI. Federal Questions 9

VII. No Substantial Federal Question Involved Requiring Grant of Certiorari 11

VIII. Argument as to Legal Issue 13

Summary of Argument 13

(1) The decision of the Connecticut Supreme Court is not the kind of final judgment which this court will review by certiorari 14

(A) The Connecticut court determined only one of three issues before it 15

(B) The petitioner failed to exercise his right to plead further after the overruling of his demurrer in the lower court 16

(2) There are no special or important reasons warranting the exercise of this court's discretion 16

(A) This decision is of the same nature as Ryan vs. Simons 16

(B) No such reasons are cited by the petitioner 17

(3) The federal questions decided are in accord with the reasoning of this court in analogous cases 17

(A) The Connecticut Supreme Court held,

(1) that the petitioner's second count alleged an unfair labor practice and nothing else;

PAGE

(2) that such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947; 18

(B) The first determination is in accordance with the interpretation of the same language by

(1) National Labor Relations Board;

(2) The petitioner himself;

(3) The determination of the New York Court of Appeals in Ryan vs. Simons 19

(C) The Connecticut court's decision on the second issue is in accord with the analogous decisions of this court 24

IX. Conclusion 28

AUTHORITIES CITED.

Cases.

Alonzo vs. Industrial Container Corp., 85 N.Y.S. (2) 835 (1948) 18, 26

Amalgamated Utility Wkrs. vs. Consolidated Edison Co., 309 U.S. 261 11

Amazon Cotton Mills vs. Textile Wkrs. of America, 167 Fed. (2) 183 (1948) 12, 26

Bakery Sales Drivers vs. Wagshal, 68 S. Ct., 630, (1948) 14

Bethlehem Steel Co. vs. N.Y. State Labor Relations Board, 330 U.S. 767 .....11, 14, 18

Bus Employees vs. Wisconsin Board, 340 U.S. 383 (1950).. 12

Costaro vs. Simon, 227 App. Div. 1045, reversed 302 N.Y. 318, 98 N.E. (2) 454 .....12, 18, 23, 26

Direct Transit Lines vs. Teamsters Union, 29 LLRM 2492 (District Court of Mich. Feb. 5, 1952) 12

PAGE

Gerry vs. Superior Court, 32 Cal. (2) 119, 194 Pac. (2) 689 ..... 12, 25

International Union of UAW-CIO vs. O'Brien, 339 U.S. 454 12

LaCrosse Telephone Corp. vs. Wisconsin Board, 336 U.S. 18, (1948) 14, 18

Memphis-Charleston R.R. vs. Pace, 282 U.S. 241 (1930) 22

Meyers vs. Bethlehem Shipbuilding Corp., 303, U.S. 41 ..... 14, 18

Montgomery Building & Construction Trades vs. Ledbetter Erection Co., 20 Labor Cases 66,407 (1951), cert. granted, U.S. Supreme Ct. June, 1952, State Court decision affirmed by the U.S. Supreme Ct. Dec. 8, 1952 15

NLRB vs. Capitol Serv. Inc., USCA, 9th Circuit, June, 1952 12

National Licorice Co. vs. NLRB, 309 U.S. 350 at page 365 25

Norris Grain Co. vs. Nordaas, 232 Minn. 91, 46 N.W. (2) 94 ..... 12, 26

Pennsylvania Labor Relations Board vs. Frank, 67 Atl. (2) 78 (1949) 18, 26

Plankington Packing House vs. WERB, 338 U.S. 953 ..... 14, 18

Pocahantis Corp. vs. Building Trades Council, 93 Fed. Suppl. 217 (District Court of Maine 1950) 12

Priest vs. Pacific Railroad, 139 Fed. (2) 813 26

Reed vs. Fawich Airflex, 86 Fed. Suppl. 822 (1949) 12, 26

Ryan vs. Simons, 342 U.S. 897 (1951) 11, 12, 13, 14, 16, 17, 19, 23, 24, 25

UAW vs. Wilson Athletic Goods, (1950) U.S. District Court Ill. CCH—No. 65,867, page 7,784 27

U. S. vs. Burnison, 339 U.S. 87 (1950) 22

Wilson & Co. vs. United Packing House Wkrs., 83 Fed. Suppl. 162 26

Statutes.

PAGE

Labor Management Relations Act 1947, 61 U.S. Statute 146 (June 23, 1947), 29 USCA 141 ff 2, 4, 5, 6, 7, 9

Connecticut General Statutes, Revision of 1949, Section 7820 21

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondent, Appellee in the above entitled cause, Ansonia Brass Workers Union, Local 445, P.M.C., IUMSWA, C.I.O., respectfully urges that the Petition for a Writ of Certiorari should be denied.

I. OPINIONS BELOW

The opinion of the Superior Court of Fairfield County, Record pages 33 and 34, is not reported.

The opinion of the Supreme Court of Errors of the State of Connecticut, Record pages 43 to 51, is reported in 139 Connecticut 44.

II. JURISDICTION OF THE COURT

The Connecticut Supreme Court of Errors held that one count of the petitioner's complaint (the second) charged the commission of unfair labor practices under the Labor Management Relations Act. A general demurrer to a defense that the state court had no jurisdiction over the subject matter of the complaint was therefore overruled because the court held that the subject matter of this second count was exclusively within the primary jurisdiction of the National Labor Relations Board. (Record page 50 and cases cited.)

Under Connecticut law a general demurrer to affirmative defenses against more than one count is properly overruled if any of the defenses are good against any of the counts. (Record page 50.) The petitioner contends that this decision deprives him of a right, privilege or immunity under the Labor Management Relations Act, a statute of the United States.

29 USCA 141 ff.

III. LEGAL ISSUE PRESENTED FOR REVIEW

The Connecticut Supreme Court decided that the plaintiff's second count could not be construed otherwise than as alleging an unfair labor practice under the Labor Management Relations Act of 1947. It

further decided that the National Labor Relations Board had exclusive primary jurisdiction over such an unfair labor practice and that therefore the state court was deprived of power to pass on this count of the complaint in the first instance. (Record pages 49 and 50.)

The legal issue presented for review is therefore not that stated in the petitioner's petition, page 3. It is rather whether the National Labor Relations Board has exclusive primary jurisdiction to remedy unfair labor practices so that the state courts are without any jurisdiction to act on such matters and whether the Connecticut Supreme Court correctly construed the second count of the petitioner's complaint to allege charges of unfair labor practices under the Labor Management Relations Act.

There is no question before this court of the jurisdiction of the state court over a cause of action of an individual employee for damages for loss of wages for breach of the collective bargaining contract. (Record page 50.) Nor is there any question under the decision of the Connecticut Supreme Court of Errors of the jurisdiction of the state court over any cause of action in tort for conspiracy to breach a collective bargaining contract. (Record pages 48 and 49.)

The Connecticut Supreme Court of Errors in rendering its decision specifically confined itself to a ruling on the question of its jurisdiction over the second count of the plaintiff's complaint which the plaintiff claims set forth a cause of action in tort. It made no decision as to its jurisdiction over the first count of the complaint which the plaintiff claim-

ed alleged a breach of contract. (Record page 50.) In ruling on the cause of action set forth in the second count of the complaint the court specifically held that the count set forth a charge of an unfair labor practice under the Taft-Hartley Act and nothing else, although it stated that the petitioner claimed that the second count stated a cause of action for conspiracy to deprive him of his seniority rights and not for an unfair labor practice. (Record pages 48, 49 and 50.)

It is submitted therefore that the legal issue presented is not that stated in the petition but rather that stated in the second paragraph under this point.

IV. FEDERAL STATUTES INVOLVED

The federal statute involved is that stated in the petition for the writ of certiorari at page 4, i.e., Labor Management Relations Act 61 U.S. Statute 146, enacted June 23, 1947. The provisions quoted in the petition are all applicable. In addition, however, the following provisions are relevant:

> Section 1 (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided**, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of

this Act or has received a construction inconsistent therewith.

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

V. NATURE OF THE CASE

The petitioner's statement of the nature of the case omits significantly the very paragraphs of his complaint which are essential to a finding that un-

fair labor practices are charged by the complaint. They are also irrelevant to the cause of action the petitioner now claims of breach of the plaintiff's seniority rights under the collective bargaining agreement. These paragraphs omitted in the petitioner's writ are 18, 19, 20, 21 and 26 of the plaintiff's complaint, Record pages 6 and 7. It was on the basis of these allegations that the Connecticut Supreme Court summarized the allegations of the plaintiff's count as follows:

> "The plaintiff alleges in the second count that he was not a member of the union. He states that he was debarred from becoming a member by vote of the union. He charges that the company and the union rearranged seniority rights without his knowledge, permission or consent so that other members of the bargaining unit, 'particularly one or more members of Local 445, PMC (the defendant union), were wrongfully given an earlier seniority than they were entitled to have as against the plaintiff's seniority.' He asserts that the defendants planned, schemed and conspired to oust him from his employment and to preclude him therefrom and that the defendants' actions were an injurious discrimination against him." (Record pages 48 and 49.)

The complaint as originally drawn alleged two causes of action, one charging breach of contract against the company, and the other charging conspiracy by the company and the union. The ruling of the Connecticut Supreme Court was confined to the second count and it is only that count which is therefore before this court for consideration on this petition. (See also discussion under III herein.)

VI. FEDERAL QUESTIONS

The petitioner's statements as to the federal questions raised leaves the erroneous impression that the Supreme Court passed upon the first count of the complaint, as well as upon the second count. This was not the case. The Connecticut Supreme Court of Errors decided that the National Labor Relations Board had exclusive jurisdiction of the second count of the petitioner's complaint which the court construed to allege charges of unfair labor practices under the National Labor Relations Act and not a cause of action for conspiracy to violate seniority rights.

61 U.S. Statute 146. (See Record pages 50, line 24 ff.)

The court stated:

"He (the plaintiff) claims that the second count of his complaint states a cause of action for conspiracy to deprive him of his seniority rights, and not for an unfair labor practice. The test lies in examining the facts alleged and standing as admitted under the demurrer, in the light of the terms of the Act . . .

". . . These charges of deprivation of seniority rights in favor of union members and of planning, scheming and conspiring to discriminate against him (the plaintiff) cannot by the circumstances under which the actions were alleged to have been perpetrated and by their very nature, as well as by the plaintiff's own characterization of them, be interpreted otherwise than as charges of unfair labor practices under the Act."

(Record pages 48 and 49.)

That court made no determination as to its jurisdiction or that of the National Labor Relations Board over the first count of the petitioner's complaint alleging breach of a collective bargaining contract, saying in so doing, "The plaintiff claims that the first count of the complaint sets forth a cause of action against the company for breach of contract. However, the demurrer interposed by the plaintiff to the special defenses was general in that it claimed that they failed to state a defense sufficient in law against either count. The defenses being good as against the second count, the demurrer fails and was properly overruled." (Record page 50.)

The decision of the Connecticut Supreme Court as it appears from the above quotation was made on an appeal from a decision of the lower court overruling a demurrer filed by the plaintiff to special or affirmative defenses set up by both the company and the union, the respondents herein. (Record page 44.) Under Connecticut practice the overruling of the demurrer permits further pleading on the part of the person filing the demurrer. This the petitioner failed and refused to do and instead permitted judgment to be entered against him for failure to plead further after the overruling of the demurrer. (Record page 44.)

The demurrer interposed by the plaintiff appellant petitioner did not reach the first special defense filed by the union as stated by the Connecticut Supreme Court of Errors in its opinion. (Record page 46.) That defense was in substance that the acts of the parties were in compliance with the collective bargaining contract. (Record pages 24 and 25.) Therefore the determination of the Connecticut Supreme

Court of Errors restricted as it was to a ruling on the nature of the second count of the complaint leaves unanswered and therefore unsettled other issues involved in the first count of the complaint and in the union's first special defense.

The only federal question therefore raised and decided adversely to the petitioner by the Connecticut Supreme Court of Errors was whether the second count of the petitioner's complaint alleged an unfair labor practice cognizable under the Taft-Hartley Act and whether such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board.

VII. NO SUBSTANTIAL FEDERAL QUESTION INVOLVED REQUIRING GRANT OF CERTIORARI

The petitioner has merely stated that the question involved is a substantial one and that the decision of the state court is not in accordance with the reasoning of this court in analogous cases. He cites no basis for either of these statements.

The denial of certiorari in the case of **Ryan vs. Simons**, 342 U.S. 897 (1951) presents a determination by this court completely in accord with the determination by the Connecticut Supreme Court of Errors in this case. The decision of the Connecticut court is also in accord with the reasoning of this court in the following cases:

Amalgamated Utility Wkrs. vs. Consolidated Edison Co., 309 U.S. 261;

Bethlehem Steel Co. vs. N. Y. State Labor Relations Board, 330 U.S. 767;

International Union of UAW-CIO vs. O'Brien, 339 U.S. 454;

Bus Employees vs. Wisconsin Board, 340 U.S. 383 (1950);

and with the following state and federal decisions:

Gerry vs. Superior Court, 32 Cal. (2) 119, 194 Pac. (2) 689;

Costaro vs. Simon, 227 App. Div. 1045, reversed, 302 N. Y. 318, 98 N. E. (2) 454;

Norris Grain Co. vs. Nordaas, 232 Minn. 91, 46 N. W. (2) 94;

Direct Transit Lines vs. Teamsters Union, 29 LLRM 2492 (District Court of Mich. Feb. 5, 1952);

Pocahantis Corp. vs. Building Trades Council, 93 Fed. Suppl. 217 (District Court of Maine 1950);

Reed vs. Fawich Airflex, 86 Fed. Suppl. 822 (1949);

NLRB vs. Capitol Serv. Inc., USCA, 9th Circuit, June, 1952;

Amazon Cotton Mills vs. Textile Wkrs. of America, 167 Fed. (2) 183 (1948).

In view of the decision in the **Ryan vs. Simons** case which involved a suit against the company and the union brought by individual employees of the company to restrain discrimination against those employees and to direct the union to waive a union shop agreement with the employer, it would seem that the petitioner here has the burden of demonstrating special and important reasons for considering the case at hand rather than the **Ryan vs. Simons** case. He has failed either to produce these reasons or to show that

the decision of the Connecticut Supreme Court is probably not in accord with the decisions of this court on the question presented.

We believe there is no substantial federal question presented here any more than there was in the Ryan case and further that the decision of the Connecticut Supreme Court is in accord with the decisions of this court and of the other state and federal courts above cited.

VIII. ARGUMENT AS TO LEGAL ISSUE

SUMMARY OF ARGUMENT:

1. The decision of the Connecticut Supreme Court is not the kind of final judgment which this court will review by certiorari.

(A) The Connecticut court determined only one of three issues before it.

(B) The petitioner failed to exercise his right to plead further after the overruling of his demurrer in the lower court.

2. There are no special or important reasons warranting the exercise of this court's discretion.

(A) This decision is of the same nature as Ryan vs. Simons op. cit.

(B) No such reasons are cited by the petitioner.

3. The federal questions decided are in accord with the reasoning of this court in analogous cases.

(A) The Connecticut Supreme Court held,

(1) that the petitioner's second count al-

leged an unfair labor practice and nothing else;

(2) that such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947.

(B) The first determination is in accordance with the interpretation of the same language by

(1) National Labor Relations Board;

(2) The petitioner himself;

(3) The determination of the New York Court of Appeals in Ryan vs. Simons.

(C) The Connecticut court's decision on the second issue is in accord with the following analogous decisions of this court:

Meyers vs. Bethlehem Shipbuilding Corp., 303 U.S. 41;

Bethlehem Steel Co. vs. N. Y. State Labor Relations Board, 330 U.S. 767;

LaCrosse Telephone Corp. vs. Wisconsin Board, 336 U.S. 18, (1948);

Plankington Packing House vs. WERB, 338 U.S. 953;

Bakery Sales Drivers vs. Wagshal, 68 Supreme Court 630 (1948).

ARGUMENT:

1. **The decision of the Connecticut Supreme Court is not the kind of final judgment which this court will review by certiorari.**

(A) THE CONNECTICUT COURT DETERMINED ONLY ONE OF THREE ISSUES BEFORE IT.

The case came before the Connecticut Supreme Court on a ruling of a trial court overruling the demurrer of the plaintiff to affirmative defenses of the respondent company and union to the two counts of the plaintiff's complaint. (Record pages 39 and 40.) The Connecticut Supreme Court confined its ruling to the sufficiency of some of these defenses to the second count of the plaintiff's complaint. (Record page 50.) It made no ruling as to the sufficiency of these defenses against the first count of the plaintiff's complaint which alleged a breach of contract. (Record page 50.) It also made no ruling as to the sufficiency of the demurrer in failing to reach one of the special defenses of the defendant union which alleged that the conduct of the company and the union had been in accordance with certain paragraphs of the collective bargaining agreement. (Record pages 24 and 46.) Consequently, these two issues remained unsettled by the decision of the Connecticut Supreme Court and its decision therefore is not a final determination of all of the issues in the case.

Consequently, any action by this court in reviewing the matter before it on certiorari would seem to be premature.

> **Montgomery Building & Construction Trades vs. Ledbetter Erection Co.**, 20 Labor Cases 66,407 (1951), cert. granted, U.S. Supreme Ct. June, 1952, State Court decision affirmed by the U.S. Supreme Ct. Dec. 8, 1952.

(B) THE PETITIONER FAILED TO EXERCISE HIS RIGHT TO PLEAD FURTHER AFTER THE OVERRULING OF HIS DEMURRER IN THE LOWER COURT.

The judgment from which an appeal was taken to the Connecticut Supreme Court is a judgment against the plaintiff for failure to plead after the overruling of his demurrer to the defendants' special defenses. Under Connecticut law he had a right to plead over after the overruling of his demurrer.

Connecticut Practice Book, Sec. 80 (1934)

This he failed and refused to do and instead elected to have judgment entered against him for failure to plead. (Record page 36.) In other words, he voluntarily avoided a complete determination of the merits of this case by his refusal to plead further. As a result the case as it reaches this court has a number of issues in it which are undecided. At this stage in the proceedings it seems scarcely the type of final determination upon which this court should exercise its discretionary power to review by certiorari.

2. There are no special or important reasons warranting the exercise of this court's discretion.

(A) THIS DECISION IS OF THE SAME NATURE AS RYAN VS. SIMONS OP. CIT.

The decision of the Connecticut Supreme Court confined itself to determining that the second count of the complaint alleged charges of unfair labor practices under the Taft-Hartley Act (Labor Management Relations Act, 1947), and that as to the subject matter of that count, exclusive primary jurisdiction was vested in the National Labor Relations

Board by the Labor Management Relations Act of 1947. (Record pages 43 to 50 and particularly pages 44, 48, 49 and 50.)

This decision therefore brings the case squarely within the fact situation covered by **Ryan vs. Simons** op. cit. Since certiorari was denied in **Ryan vs. Simons**, it would seem that one of the questions this court must answer is whether there are important or special reasons for considering this case which either differ from or are greater than the reasons for considering the **Ryan vs. Simons** case on certiorari. We know of none.

(B) NO SUCH REASONS ARE CITED BY THE PETITIONER.

The petitioner has urged no such special or important reasons for the consideration of this case. Without such reasons there is no basis under Rule 38 for the exercise of this court's discretion.

3. The federal questions decided are in accord with the reasoning of this court in analogous cases.

The decision of the Connecticut Supreme Court of Errors as set forth above also raises no substantial federal question which has not heretofore been determined by this court. On the contrary, the decision of the Connecticut Supreme Court seems to be an expression of the well-accepted doctrine that where a party attempts to enforce in state courts rights traceable solely to the National Labor Relations Act (Labor Management Relations Act) and not independently to the common law or general state statutes, the action should be dismissed because

of the exclusive primary jurisdiction of the National Labor Relations Board.

Vol. 3, Labor Law Journal 1 at page 74 citing:

Alonzo vs. Industrial Container Corp., 85 N.Y.S. (2) 835 (1948);

Pennsylvania Labor Relations Board vs. Frank, 67 Atl. (2) 78 (1949);

Costaro vs. Simons, 302 N. Y. 318 at 321, 98 N. E. (2) 454;

Meyers vs. Bethlehem Shipbuilding Corp., 303 U.S. 41;

Bethlehem Steel Co. vs. N. Y. State Labor Relations Board, 330 U.S. 767;

LaCrosse Telephone Corp. vs. Wisconsin Board, 336 U.S. 18 (1948);

Plankington Packing House vs. WERB, 338 U.S. 953.

(A) THE CONNECTICUT SUPREME COURT HELD,

(1) that the petitioner's second count alleged an unfair labor practice and nothing else;

(2) that such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947.

Throughout the petition the petitioner repeatedly asserts that the cause of action upon which the Supreme Court of Connecticut passed was one in both contract and tort. Actually, as we have pointed out, the decision of the Connecticut Supreme Court was narrowly confined to determining that the second count of the complaint, the one which the petitioner

claims to allege a tort, alleged a charge of an unfair labor practice under the National Labor Relations Act and could not be otherwise interpreted. The Connecticut Supreme Court did not determine whether the same defenses of exclusive primary jurisdiction of the National Labor Relations Board were good against the first count of the complaint which alleged a breach of contract. (Record page 50.)

(B) THE FIRST DETERMINATION IS IN ACCORDANCE WITH THE INTERPRETATION OF THE SAME LANGUAGE BY

(1) National Labor Relations Board;

(2) The petitioner himself;

(3) The determination of the New York Court of Appeals in Ryan vs. Simons.

The petitioner claims that the Connecticut Supreme Court was in error in determining that the second count of his complaint should be interpreted as alleging an unfair labor practice under the Taft-Hartley Act. He cites as his reason for this the omission in his complaint of any statement that the activities of the union and the company complained of were for the purpose of encouraging or discouraging union membership. Conversely he also claims to have set up a cause of action for a conspiracy to violate the petitioner's seniority rights under the contract.

However, both of these matters were considered by the Connecticut Supreme Court and passed upon unequivocally. As to the first, the Supreme Court considered the specific allegations of the complaint

rather carefully and reviewed them in the following language:

> "The plaintiff alleges in the second count that he was not a member of the union. He states that he was debarred from becoming a member by a vote of the union. He charges that the company and the union rearranged seniority rights without his knowledge, permission and consent so that other employees of the bargaining unit, 'particularly one or more members of Local No. 445 P.M.C. (the defendant union), were wrongfully given an earlier seniority than they were entitled to have as against the Plaintiff's seniority.' He asserts that the defendants' actions 'were an unjust discrimination' against him. For the purpose of a decision on the demurrer, he concedes that he filed charges against the defendants with the National Labor Relations Board in which he himself claimed that the actions of the defendants which were the grounds of his complaint 'constitute unfair labor practices affecting commerce within the National Labor Relations Act.' These charges of deprivation of seniority rights in favor of union members and of planning, scheming and conspiring to discriminate against him cannot by the circumstances under which the actions were alleged to have been perpetrated and by their very nature, as well as by the plaintiff's own characterization of them, be interpreted otherwise than as charges of unfair labor practices under the act. To discriminate in hiring, in tenure, or concerning any term or condition of employment by reason of union activities is an unfair labor practice. The cases are legion. See 29

U.S.C.A. par. 158, n. 159, and Sup. 1951. Likewise, discrimination against an employee because he like the plaintiff in this case, is not a member of the union representing the employees of a particular employer, or because he fails or refuses to join one, is an unfair labor practice under the act.

National Labor Relations Board v. American Car & Foundry Co., 161 F. 2d 501, 503;

Virginia Electric & Power Co. v. National Labor Relations Board, 132 F. 2d 390, 396;

National Labor Relations Board v. Yale & Towne Mfg. Co., 114 F. 2d 376, 378;

National Labor Relations Board v. Empire Worsted Mills, Inc., 129 F. 2d 668, 669;

National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206, 218, 60 S. Ct. 493, 84 L. Ed. 704;

2 Teller, Labor Disputes & Collective Bargaining, par. 305, pp. 828, 830, par. 309, p. 838, par. 310, p. 838, par. 324, p. 867;

173 A.L.R. 1424."

It is clear from this quotation of the court's opinion that the omission of the conclusion as to the purpose of these activities alleged in the plaintiff's complaint in no way changed the essential and obvious meaning of the allegations from that determined by the Connecticut Supreme Court of Errors. As a matter of fact under Connecticut practice complaints are to state facts and not conclusions.

Connecticut General Statutes, Revision of 1949, Section 7820.

Consequently the very statement the petitioner believes essential to charge an unfair labor practice could not have been included in the pleadings under Connecticut law.

As to the second contention of the petitioner, the Connecticut Supreme Court was equally clear-cut in its denial of this claim. The court states, "He claims that the second count of his complaint states a cause of action for conspiracy to deprive him of his seniority rights and not for an unfair labor practice. The test lies in examining the facts alleged and standing as admitted under the demurrer in the light of the terms of the Act." (At page 48.) Then follows a quotation of the pertinent provisions of the Labor Management Relations Act and the quotation set forth above ending in the statement that "These charges . . . cannot . . . by their very nature as well as by the plaintiff's own characterization of them be interpreted otherwise than as charges of unfair labor practices under the Act." (Emphasis ours.) (Record page 49.)

While the determination by the Connecticut Supreme Court that the plaintiff's pleadings alleged unfair labor practices under the Labor Management Relations Act of 1947 may be questioned by this court, its collateral determination that the pleadings could not be interpreted to state a cause of action of conspiracy to deprive him of his seniority rights would seem to be solely a matter of state law and therefore binding on this court.

U.S. vs. Burnison, 339 U.S. 87 (1950);
Memphis-Charleston R.R. vs. Pace, 282 U.S. 241 (1930).

An examination of the first count of the complaint demonstrates how the petitioner might have set up a cause of action in tort and not as an unfair labor practice charge in the second count of the complaint by omitting the very paragraphs he included in the second count and failed to include in the first count as to the denial of union membership, the preferring of union members over him, and the charge that the actions were in violation of the Taft-Hartley Act. (Record pages 6, 7, paragraphs 18, 19, 20, 21, 25, 26.)

The same charges made in the second count of the complaint had also been made to the National Labor Relations Board by the petitioner and characterized by him as "unfair labor practices affecting commerce within the National Labor Relations Act." (Record page 18.) The National Labor Relations Board acting through its regional director considered the charges as charges of unfair labor practices under the National Labor Relations Act as amended, but found that there was not sufficient evidence to warrant further proceeding and therefore refused to issue a complaint. (Record page 20.)

In the case of **Ryan vs. Simons**, 302 N. Y. 742 c.d. 342 U.S. 897 the plaintiff also attempted to set forth a cause of action under state law but the New York Court of Appeals held that the basic question involved was one of discrimination for union activity, that that was an unfair labor practice under the Labor Management Relations Act and therefore within the exclusive primary jurisdiction of the National Labor Relations Board.

In the companion case of **Costaro vs. Simons**, 302

N. Y. 319 (1951) the complaint charged a violation of the plaintiff's seniority rights by both the union and the company and further charged that the union had refused to admit the plaintiff into its membership. The New York Court of Appeals held that such pleading must be read as alleging that the controversy involved an unfair labor practice under the Labor Management Relations Act which required resort in the first instance to the National Labor Relations Board.

In order to reach the conclusion which the petitioner now requests this court to reach that his second count did not set up charges of unfair labor practices, this court would have to ignore the above cited paragraphs of the second count which constitute at least one third of that count. It would have to ignore the fact that both the petitioner and the National Labor Relations Board considered the same charges as charges of unfair labor practices under the Labor Management Relations Act of 1947. (Record pages 20, 21, 22 and 23.) It would require this court to give less weight to the decision of the Connecticut Supreme Court as to the interpretation of Connecticut pleadings than this court has given to the interpretation of the New York Court of Appeals in the case of **Ryan vs. Simons** op. cit.

For these reasons the conclusion reached by the Connecticut Supreme Court seems the only reasonable one under the circumstances.

(C) THE CONNECTICUT SUPREME COURT'S DECISION ON THE SECOND ISSUE IS IN ACCORD WITH THE ANALOGOUS CASES OF THIS COURT:

Meyers vs. Bethlehem Shipbuilding Corp., 303 U.S. 41;

Bethlehem Steel Co. vs. N. Y. State Labor Relations Board, 330 U.S. 767;

LaCrosse Telephone Corp. vs. Wisconsin Board, 336 U.S. 18 (1948);

Plankington Packing House vs. WERB, 338 U.S. 953;

Bakery Sales Drivers vs. Wagshal, 68 Supreme Ct. 630 (1948).

The question before this court then is whether, assuming the complaint charges unfair labor practices under the Taft-Hartley Act, exclusive primary jurisdiction is vested in the National Labor Relations Board. This is the precise question which was before this court in the petition for certiorari in the case of **Ryan vs. Simons** and in that case certiorari was denied. No reason has been presented in this case why certiorari should be granted in view of its denial in the **Ryan** case.

The decision of the Connecticut Supreme Court that exclusive primary jurisdiction of unfair labor practices is vested in the National Labor Relations Board is in accordance with the decisions of this court above cited and with:

National Licorice Co. vs. NLRB, 309 U.S. 350 at page 365;

It is in accord with the following state and federal decisions:

Gerry vs. Superior Court, 32 Cal. (2) 119, 194 Pac. (2) 689;

Alonzo vs. Industrial Container Corp., 85 N.Y.S. (2) 835 (1948);

Pennsylvania Labor Relations Board vs. Frank, 67 Atl. (2) 78 (1949);

Costaro vs. Simons, 302 N. Y. 318 at 321, 98 N. E. (2) 454;

Norris Grain Co. vs. Nordaas, 232 Minn. 91, 46 N. W. (2) 94;

Amazon Cotton Mills vs. Textile Wkrs. of America, 167 Fed. (2) 183 (1948) 183 at 190.

The authorities cited by the petitioner are not in point. They concern cases under the Railway Labor Act which has a different legislative background, history and purpose:

Priest vs. Pacific Railroad, 139 Fed. (2) 813; or they concern cases in which the existence of a cause of action under state law or under common law as well as under the Labor Relations Act had been established; (Cases cited on page 17 of Petitioner's brief; cases cited top of page 15 and also page 16 of Petitioner's brief); or they concern cases involving matters which were not unfair labor practices under the Taft-Hartley Act (cases cited page 15 of Petitioner's brief), or which did not involve any federal question at all (cases cited bottom page 16 of Petitioner's brief); or they involve cases concerning the interpretation of Section 301 of the Labor Management Relations Act of 1947:

Wilson & Co. vs. United Packing House Wkrs., 83 Fed. Suppl. 162;

Reed vs. Fawich Airflex, 86 Fed. Suppl. 822;

UAW vs. Wilson Athletic Goods, (1950) U.S. District Court Ill. CCH—No. 65,867, page 7,784.

Even writers who urge the extension of state jurisdiction over matters also within the jurisdiction of the National Labor Relations Board seem to be agreed that where the matter is clearly only a violation of the Labor Management Relations Act and does not involve a cause of action under state law, the National Labor Relations Board has exclusive primary jurisdiction.

cf. Labor Law Journal, Vol. 3, No. 1, page 74, where the writer, Professor Sylvestro Petro of New York University says:

> "Of course, if a complaining party attempts to enforce in state courts rights traceable solely to the NLRA—and not independently to the common law or general state statutes—the action should be dismissed: Section 10 (a) and the decisions in Bethlehem, LaCrosse and Plankington would seem to be conclusive on this point . . ."

We submit therefore that on the narrow issue before this court of the exclusive primary jurisdiction of the National Labor Relations Board to remedy unfair labor practices the decision of the Connecticut Supreme Court is in accord with analogous decisions of this court. There is therefore no substantial federal question involving a decision contrary to the analogous decisions of this court.

IX. CONCLUSION

In the light of the above discussion we submit that certiorari should be denied in this case because none of the usual bases for the exercise of discretion by this court under Rule 38 are present.

Dated at Bridgeport, Connecticut, this 16th day of December, 1952.

The Respondent-Appellee,
Ansonia Brass Workers Union
Local 445, P.M.C., IUMSWA,
C.I.O.,
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